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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

W. CLAY RODGERS,
Petitioner
vs.
UNITED STATES OF AMERICA,
Respondent

April Term, 1947.
No. 58

PETITION FOR WRIT OF CERTIORARI
TO
UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

New York Law Reporting Co., Law Printers, N. Y. C.

SUBJECT INDEX

	Pages
Petition for Certiorari	1
Summary Statement of Case	2
Jurisdiction of this Court (28 U.S.C.A. Sec. 347, Judicial Code Section 240.)	3
QUESTIONS PRESENTED:	
1. Should interest on penalties be allowed prior to judgment?	3
2. Are the exactions here imposed, in reality, penalties, or a mere debt?	3
3. Can such penalties be recovered while the Act and Regulations prescribing these are suspended?	3
Reasons relied on for granting Writ	3-5
Brief and Argument	5
Assignment of Errors	5
Discussion of:	
First Error Assigned	6
Second Error Assigned	8
Third Error Assigned	12
Opinion of Court of Appeals	R36

TABLE OF STATUTES, ORDERS AND RESOLUTION CITED

	Pages
Agricultural Adjustment Act of 1938 as amended	
Sections 348 (7 U.S. C.A. 1348) and 371, (7 U.S. C.A.) quoted	8, 13
Section 345 (7 U.S.C.A. 1345) quoted	14
Interest Statutes:	
Title 28 U.S.C.A. Section 811, U. S. Rev. St. 966	7
7 U. S. C. A. Sec. 86, 5197, U. S. Rev. St. quoted	9
Administrative Orders of:	
War Food Administrator (8FR, 12922 and 12933)	5
Secretary of Agriculture (9FR 13739, 13740; 10FR 14135)	5
Joint Resolution of Congress (July 24, 1947, C616, 60 Stat. 662.)	5
Saving Clause Statute, 1 U.S.C.A. Section 29	15

TABLE OF CASES CITED

Belts vs. Col. Nat. Bank, 87 Pac. 89	7
Bowles Admr. O.P.A. vs. May Hardwood Co., 140 Fed. (2nd) 914	16
Brown vs. Barry, 3 Dall., 365, 367, 1 L.Ed. 638	15
First Nat. Bank vs. Overman, 22 Neb., 116, 34, N.W. 107	7
Hawthorne, et al, vs. State, 87 S.W. (Texas) 839, page 841	7
Heinssen vs. State, 23 Pac. 995, 997, 14 Col. 228	15
Helwig vs. U. S., 188 U. S., 605, 47 L.Ed., 614	8
Ingraham vs. Merchant's Nat. Bank, 153 Iowa, 408, 132 N.W. 869	7
Levey vs. Stocklager, 129 U.S. 470, 32 L.Ed., 785	14

TABLE OF CASES—(Continued)

	Page
McCleary vs. First National Bank, 109, Tenn. (1 Cates) p. 142	6
Moran vs. Hagerman, 69 Fed., 427, (aff. 75 Fed. (9CCA) 97, 59 U.S. 261, 40 Ed. 147.)	7
Newton vs. First National Bank, 3 Kan. A. 352, 42 Pac. 936	7
People vs. Sutter St. Railway Co., 129, Cal. 545, 62 Pac. 104	7
Phillips vs. Greene, 288 Ky. 202, 155 S.W. 841, p. 844	6
Pierce vs. U. S. 255, U.S. 398, p. 406, 65 L.Ed. 697	6
Rodgers vs. U. S. 138 Fed. (2nd) 992	11
South Carolina vs. Gaillard, 101 U. S. 433, 438, 25 L.Ed. 937, 939	15
State vs. Banks, 46 S.C. Law (12 Richardson) 609, 616	12
State vs. Ill. Howe Scale Co., 203 Mo. A. 550, 218 S.W. p. 359	7
State vs. Owsley, 17 Mont. 94, 42 Pac. 105	7
Sunshine Anthracite Coal Co. vs. Adkins, 310 U.S. 381, 401, 84 L.Ed. pp. 12-75	11
U. S. vs. Chambers, et al, 91, U.S. 217, 78 L.Ed. p. 765	14
U. S. vs. Curtis-Wright Export Corp., 299 U. S. 304, 81 L.Ed. 255	15
U. S. vs Chouteau, 102 U. S., 603, 26 L.Ed. 246	10
U. S. vs. Hark, 320 U.S. 521, 88 L.Ed. 222	15
U. S. vs. Jacob Schmidt Brewing Co., 254, Fed., 714	6
U. S. vs. West Texas Cotton Oil Co., 155 Fed. (2d) 463	4, 6
Washington & Georgetown R. R. Co. vs. Harman, 147, U. S. 571, 584-5	6
Western Fruit Growers vs. U. S. 124 Fed., (2nd) 381	4,8
Yeaton vs. U. S., 5 Cranch, 281, 3 L.Ed. 301	14

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To The Honorable, The Chief Justice, and The Associate Justices of The Supreme Court of the United States:

Petitioner, W. Clay Rodgers, prays this Court to review, on Writ of Certiorari, an affirmance by the Sixth Circuit Court of Appeals on January 13, 1947, in the case of W. Clay Rodgers, Appellant, vs. United States of America, Appellee, of a judgment of the United States District Court for the Western District of Tennessee rendered March 4, 1946, for the total sum of $8,721.98, made up of $7,039.52, principal, cotton penalties, and $1,682.46, interest before judgment.

SUMMARY STATEMENT OF THE CASE

This is a suit to recover cotton penalties provided by the 1938 Agricultural Adjustment Act (7 U.S.C.A. 1281 et seq., 1348) as amended by Public 74, 77th Congress, approved May 26, 1941 (7 U.S.C.A. Supp. III, 1340), and Regulations promulgated thereunder by the Secretary of Agriculture, and to require Defendant to file certain reports provided for therein. R. pp. 2-8, 10 and 11.

Defendant moved to dismiss on the grounds that said Act and Regulations were then suspended by orders of the War Food Administrator (and later by the Secretary of Agriculture) and such penalties were therefore not recoverable. R. p. 9.

This motion was denied. R. p. 15.

Defendant then answered, admitting the formal parts of the Complaint, and avering he had filed the reports sought, with the exception of a minor detail—the names of the purchasers of the cotton for one year—but denying liability for the penalties, on the grounds that these are not enforceable because the Act and Regulations are now suspended. R. pp. 16 and 17.

The evidence was stipulated. R. pp. 18-22.

The pertinent paragraph reading:

> "It is further stipulated that the total amount of the cotton marketing penalties for the years 1940, 1941 and 1942 amount to the sum of $7,039.52, and same are unpaid. And the Defendant stipulates and agrees that the only questions involved are legal questions as to whether or not the farm marketing quota penalties for the marketing years of 1940-1941, 1941-1942 and 1942-1943 have been suspended by orders of

the War Food Administrator issued in July and September, 1943, 8FR 12, 922-12, 923, and (the Secretary of Agriculture) November 1944 and 1945 F. R. 44-17515 and 45-20837, and the question of law as to whether or not interest should be allowed on the penalties. R. p. 21. (Parenthesis supplied)." R. p. 21, Par. VI.

On March 4, 1946, the District Court rendered judgment against Defendant for the principal sum of $7,039.52, penalties, plus $1,682.46, interest, or a total of $8,721.98, and costs, from which Defendant appealed to the Sixth Circuit Court of Appeals. R. pp. 22, 26, 32 and 33. That Court affirmed. R. p. 35.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is based on Section 347, Title 28, U.S.C.A., Section 240, Judicial Code, as amended.

QUESTIONS PRESENTED

1. Should interest on penalties be allowed prior to judgment?

2. Are the exactions here imposed, in reality, penalties, or a mere debt.

3. Can such penalties be recovered while the Act and Regulations prescribing these are suspended?

REASONS RELIED ON FOR GRANTING WRIT

1. There is a conflict in the opinions of the Sixth Circuit Court of Appeals in this case, and that of the Fifth Circuit Court of Appeals in the case of U. S. vs. West

Texas Cotton Oil Company, 155 Fed., 2nd., 463, in that, the latter Court held "since in fact and in law, the amount sued for is a penalty, *no interest* can be recovered on it *before judgment.*"

While, the lower court (Sixth Circuit) here affirmed the recovery of interest on identically the same penalties prior to judgment. R. p. 41.

2. Again, the Fifth Circuit, Supra, held the very imposition here complained of to be "* * *in fact and in law* * * *a penalty*", but the Sixth Circuit reached exactly the opposite conclusion:

> "This requires consideration whether the so-called penalties provided in the Agricultural Adjustment Act are, in essence, *true penalties.*" R. p. 39.

And conclude:

> "We are persuaded that the so-called penalties prescribed *in the Act* are not in a true sense the penalties considered by the Tennessee Court upon which interest was held not recoverable." R. p. 40.
>
> "* * It is a *debt* which arises through operation of law. R. p. 40.
>
> "* * It does not appear, however, that in that case (U. S. vs. West Texas Cotton Oil Co.) the distinction here and elsewhere drawn *between a true penalty* as punishment for law violation and a sanction such as is here involved, was passed upon or given consideration by the Court." R. p. 40.

This holding is also in conflict with that of the 9th Circuit Court of Appeals in the case of Western Fruit Growers vs. U. S., 124, Fed. (2nd) 381, where, on page 387, it is announced:

"The Agricultural Adjustment Act, in our opinion *is penal in nature* and therefore exclusive jurisdiction is in the Federal Courts to enforce it or to prevent it's violation."

3. In this case, the lower court has held that the suspension of the provisions of the Statute (Section 1348, Title 7, U.S.C.A., Section 348, Agriculture Adjustment Act, as amended; public 74, 77th Congress, approved May 26, 1941, 7, U.S.C.A. Supp. III, 1340), first, by the War Food Administrator (July 10th, 1943, and September 21st, 1943, 8FR, 12922 and 12933 for the years 1943 and 1944, authorized by Executive Orders, 9222 and 9334, 8FR 3807 and 5433), second, by the Secretary of Agriculture for the years 1945 and 1946 (9FR, 13739-13740; 10FR, 14135) by direction of Section 371 of the Act (Section 1371, Title 7, U.S.C.A.), and, third, by Joint Resolution of Congress for 1947 (Joint Res. July 24, 1946, C. 616, 60 Stat. 662) is, in reality, not a suspension of the Statute, contrary to the great weight of authority. R. pp. 37 and 38.

BRIEF AND ARGUMENT

To avoid repetition, Petitioner begs leave to rely upon the Summary Statement, etc., Supra.

ASSIGNMENT OF ERRORS

1. The Sixth Circuit Court of Appeals erred in holding interest on penalties recoverable before judgment.

2. The Lower Appellate Court erred in holding the impositions here exacted to be "a debt which arises through operation of law" instead of a "true penalty."

3. They likewise erred, in holding that said penalties were enforceable during the suspension of the provisions of the Statute, and activating Regulations, in the absence of a saving clause.

DISCUSSION OF FIRST ERROR ASSIGNED

This raises the question as to whether interest, before judgment, should be allowed.

In the case of U. S. vs. West Texas Cotton Oil Company, 155 Fed., 2nd, 463, that Court expressly determines that, "*no interest can be recovered* on" the specific penalties here involved "*before judgment.*"

This is not only consonant with the established law of Tennessee, where this case originated, but with the great weight of authority.

> "• • Laws prescribing penalties and forfeitures are strictly construed, and, in the absence of any authority *in the act for interest on the penalty, we can not superadd it.* Duncan vs. Maxey, 5 Sneed."
>
> McCleary vs. First National Bank, 109, Tenn. (1 Cates) p. 142.
>
> "At common law judgments do not bear interest; *interest rests solely upon statutory provisions.* Perkins vs. Fourniquet, 14 How. 328."
>
> Washington & Georgetown R. R. Co. vs. Harman, 147, U. S. 571, 584-5.
>
> Pierce vs. U. S. 255, U. S. 398, p. 406, 65 L. Ed. 697.
>
> U. S. vs. Jacob Schmidt Brewing Co., 254, Fed., 714.
>
> Phillips vs. Greene, 288 Ky. 202, 155 S. W. 841, p. 844.

State vs. Ill. Howe Scale Co., 203 Mo. A. 550, 218 S. W. p. 359.

Hawthorne, et al, vs. State, 87 S. W. (Texas) 839, page 841.

Newton vs. First National Bank, 3 Kan. A. 352, 42 Pac. 936.

State vs. Owsley, 17 Mont. 94, 42 Pac. 105.

People vs. Sutter St. Railway Co., 129, Cal. 545, 62 Pac. 104.

Ingraham vs. Merchant's Nat. Bank, 153 Iowa, 408, 132 N. W. 869.

First Nat. Bank vs. Overman, 22 Neb. 116, 34, N. W. 107.

Belts vs. Col. Nat. Bank, 87 Pac. 89.

United States vs. West Texas Cotton Oil Co., Supra.

Under Section 811, Title 28, U.S.C.A. and U. S. Rev. St. 966, interest is not allowed on *every* judgment, but "* * interest shall be allowed on judgments rendered in the Federal Courts *only* when allowed on (that particular kind of) judgments by the laws of the State in which the Court was held * *."

Moran vs. Hagerman, 69 Fed., 427 (aff. 75 Fed. (9 CCA) 97, 59 U.S. 261, 40 L. Ed. 147).

If this rule be strictly applied in this case, interest should not be recovered on the penalties here involved either before or after judgment, because this is the established law of Tennessee.

First National Bank vs. McCleary, Supra.

The Agricultural Adjustment Act nowhere provides for interest, therefore, none is allowable.

The classification of the penalties here sought, as "*a debt* which arises through operation of law", instead of "a true penalty", will be treated in the next assignment.

DISCUSSION OF THE SECOND ERROR ASSIGNED

This presents the issue as to whether the demand is a "debt" by operation of law, or, in reality, a penalty.

The Agricultural Act, itself, Section 348, defines these impositions to be "penalties."

> "Sec. 348, *Penalties*—Any farmer who, while marketing quotas are in effect, markets cotton in excess of the farm marketing quota for the marketing year for the farm on which cotton was produced, shall be *subject to the following penalties*, with respect to the excess so marketed, "* * *:" (7 U.S.C.A. 1348).

Patently, Congress intended to lay *"a true penalty"* on the "excess so marketed."

The amount demanded, and here sued for, 7c and 8c per pound, is approximately 50% of the value of the cotton. This makes intent to punish or deter evident.

Helwig vs. U. S. 188 U. S. 605, 47 Law Ed., 614.

Again, this holding is in direct conflict not only with that of the Fifth Circuit in U.S. vs. West Texas Cotton Oil Co., Supra, to the effect, that the exactions here sought are "* * *in fact and in law* * * *a penalty"*, but also contrary to the holding of the Ninth Circuit in the case of Western Fruit Growers vs. U. S. 124 Fed., (2nd) 381, where on page 387, it is announced:

"The Agricultural Adjustment Act, *in our opinion, is penal in nature*, and, therefore, exclusive jurisdiction is in the Federal Courts to enforce it or to prevent it's violation."

The Lower Court declines to accept the law of Tennessee, as declared in the case of McCleary vs. First Nat. Bank, Supra, on the grounds that there is a marked distinction in the penalties provided by the two statutes, although the distinguishing features are not pointed out.

We respectfully submit, that the subject matter of the two statutes are strikingly similar. The one involved here imposed a penalty for the sale of "excess cotton", the one there construed, imposed a penalty for collecting *excess interest*, in this language:

"The taking, receiving, reserving or charging *a rate of interest* greater than is allowed by the preceding section (that prescribed by state laws), when knowingly done, will be deemed a forfeiture of the entire interest, * *. The person by whom it has been paid or his legal representative, may recover back in an action *in the nature of a debt*, twice the amount of the interest thus paid * *." 5197, U. S. Rev. St. 7 U.S.C.A. Section 86.

If there is here a distinction, it is certainly without a material difference.

The collection of too much interest is no more a transgression of the law, than the marketing of too much cotton. Neither is forbidden, but the doing of either is penalized. It is difficult to see how the two Statutes could be more parallel.

"The term penalty involves the idea of punishment, and it's character is not changed by the mode in which

it is inflicted, whether by *a civil action* of a criminal persecution."

U. S. vs. Chouteau et al, 102 U. S., 603, 26 L. Ed. 246.

Again, neither this case, nor those cited in the opinion below (R. p. 39) as defining away the penal nature of the demand here sought, supports the "debt" theory, or definition attributed. On the contrary, they leave no doubt of its true penal character.

The explanation of the Sixth Circuit herein, justifying its adverse position, on the grounds that the Fifth Circuit failed to take into consideration the "distinction * * between a true penalty and a sanction such as is here involved", is not acceptable. For, that Court was defining identically the same "penalty". It could not have escaped consideration of the full nature of the very thing it was called upon to determine.

It is inconceivable that that Court did not weigh the full purport of its language when it said, the very imposition here involved is "* * *in fact and in law* * * *a penalty.*"

To so hold, is, in effect, to charge that Court with negligence, and this same criticism is just as applicable to the Ninth Circuit, when it says:

"The Agricultural Adjustment Act, *in our opinion is penal in nature* * * ". (Western Fruit Growers vs. U. S., Supra.)

It was impossible for them to have formed an "opinion", without considering its "nature".

Besides, it is to be supposed that Congress used the term "penalties" advisedly.

Undoubtedly the opinion of the lower court in this case is in irreconcilable conflict with that of the Fifth Circuit in the two foregoing particulars, as well as that of the Ninth Circuit.

In addition, being out of harmony with the express provision and intent of the act itself, and the weight of authority.

We further respectfully submit, that the holding in this case to the effect, that these penalties are a mere "debt which arises through operation of law" is also inconsistent with a former opinion of the Sixth Circuit between the same parties, involving exactly the same penalties. Rodgers vs. U. S. 138 Fed. (2nd) 992.

In that case, they held these penalties not to be in the nature of a tax, or for the purpose of revenue, but laid purely as a sanction, that is, a deterrent—punishment—a penalty for, and to prevent, overproduction.

> "Coercion is the very essence of any penalty exacted for failure of submission."
>
> Sunshine Anthracite Coal Co. vs. Adkins, 310 U.S. 381, 401, 84 L. Ed. pp. 12-75.

Hence, if this demand is not a tax, nor exacted for the purpose of revenue, but is imposed to prevent, or punish for, a transgression of law, how can it be said to be a mere "debt" by operation of law. A debt for what? How does the overproduction of cotton injure or damage the Respondent, so as to make her a creditor and the petitioner a debtor?

Helwig vs. U. S., Supra.

We, therefore, urge that even the two opinions of that Honorable Court are out of harmony.

DISCUSSION OF THIRD ERROR ASSIGNED

This Assignment urges that termination or suspension of the cotton quotas—the very essence and sole function of the Act—first, by the Food Administrator, second, by the Secretary of Agriculture, and third, by Joint Resolution of Congress, itself, suspends the right to collect or recover outstanding penalties.

Both lower courts, and Respondent, have apparently confused the suspension of the Statute, as here, with that of an Administrative Order.

There is a pronounced difference.

The supersession of an Administrative Order in no wise affects the Statute.

But, the suspension of the provisions of the Act, itself, terminates its effectiveness, until it is restored, or the suspension expires.

The law is simply rendered inoperative as much so as if repealed for the time being.

> "Where an Act imposing a penalty is suspended, it cannot be enforced during the period of suspension, for penalties previously incurred." (Headnote 3).
>
> "I think suspension has the same effect of a repeal during the period of suspension. * * * It was the same as if it did not exist. The effect of repeal on a penalty incurred before the repealing Act, is to discharge the penalty."
>
> State vs. Banks, 46 S. C. Law (12 Richardson) 609, 616.

The Act, itself, provides for its own termination or suspension:

Sec. 371. (a) "If at any time the Secretary has reason to believe that in the case of corn, wheat, *cotton*, rice, peanuts, or tobacco the operation of farm marketing quotas in effect will cause the amount of such commodity which is free of marketing restrictions to be less than the normal supply for the marketing year for the commodity then current, he shall cause an immediate investigation due notice and opportunity for hearing shall be given to interested persons. If upon the basis of such investigation the Secretary finds the existence of such fact, he shall proclaim the same forthwith. *He shall also in such* proclamation specify such increase in, *or termination of, existing quotas* as he finds, on the basis of such investigation, is necessary to make the amount of such commodity which is free of marketing restrictions equal the normal supply." 7 U.S.C.A. 1371.

The quotas are not prescribed by any administrative order, but by the Act (Sec. 346, 7 U.S.C.A. 1346), and Congress has delegated to the Secretary of Agriculture the power to suspend these, the only activating provisions of the Statute. Sec. 371, Supra.

So, the Lower Court's pronouncement to the effect that, "No such authority has here been withdrawn by the only power competent to withdraw it—the Congress of the United States" (R. p. 38), overlooks the fact that "* * Congress may certainly delegate to others powers which the legislature may rightfully exercise, itself."

Wayman vs. Southard, 10 Wheat, pp. 42 and 43.

That is exactly what has been done here.

The Orders of Termination are not ones superseding an Administrative Order, but of the literal provisions of the law. The fact that Administrative orders, if any, under the Act are also suspended, makes no difference. They are merely incidental.

This Court has held that no relief is available during the suspension of an Act of Congress.

Levey vs. Stocklager, 129 U.S.-470-32 L. Ed. 785, where, on page 787, it is said:

> "The principal question argued at the Bar was as to the effect of the joint resolution in *suspending* the execution of the Prior Act. * * *It suspends the execution of the Act, until the further Order of Congress.* * * *Until Congress should further Order*, the operation of the Act of March 2nd, 1867, was by the joint resolution *effectually suspended.*"

By Section 345 of the Act, 7 U.S.C.A. 1345, the Secretary is empowered to restore the Statutory quotas—not any that he can prescribe—whenever he finds conditions warrant.

> Sec. 345. "Whenever the Secretary determines that the total supply of cotton for any marketing year exceeds by more than 7 per centum the normal supply thereof for such marketing year, the Secretary shall proclaim such fact not later than November 15 of such marketing year * * *and marketing quotas shall be in effect* during the next succeeding marketing year with respect to the marketing of cotton. * * *

Since its beginning, this Court has adhered to the principle, that:

> " * * In case a Statute is repealed or rendered *inoperative, no further proceeding can be had to enforce it,* in pending prosecutions, unless competent authority has kept the statute alive for that purpose."

U. S. vs. Chambers, 291, U. S. 217, 78 L. Ed., page 765.

Yeaton vs. U. S. 5 Cranch, 281, 3 L. Ed., 301.

There is no provision in the Agricultural Adjustment Act preserving the right to enforce penalties after "termination."

If the Act had been repealed, instead of suspended, this would not be true. 1 U.S.C.A., Section 29.

> "The suspension of an Act for a limited time is not a repeal of it."
>
> Brown vs. Barry, 3 Dall. 365, 367, 1 L. Ed. 638.

In the case of U.S. vs. Hark, 320 U.S. 531 88 L. Ed. 222, this Court accepted the holding of the District Court, to the effect, that Section 29, supra, being contrary to the common law, must be strictly construed and limited to *repealed* statutes. The lower court in this case, also recognized this doctrine. R. p. 38.

> "A repeal puts an end to the law. Suspension holds it in abeyance. Brown vs. Barry, 3 Dall. 365."
>
> Heinssen vs. State, 23 Pac. 995, 997, 14 Col. 228.

Of course, as held in State vs. Banks, supra, there can be no collection of a penalty after the repeal or suspension of a Statute.

South Carolina vs. Gaillard, 101 U.S. 433, 438, 25 L. Ed., 937, 939.

In this particular, the lower courts have rested their opinions on three cases, urged by the Government to be conclusive in this matter. They are:

> U. S. vs. Hark, 320, U. S., 531, 88 L. Ed. 222.
>
> U. S. vs. Curtis Wright Export Corporation, 299, U. S., 304, 81 L. Ed. 255.

Bowles, Admr. O P A vs. May Hardwood Co. (6 C.C.A.), 140 Fed. 2nd, 914.

Not one of these cases is parallel to the one now before this Court.

In the first, Hark vs. U. S., it was contended by Hark that a previous order which he had violated, by charging a higher price, had been rendered ineffectual by a later superseding order designating a different price, thus relieving him of any punishment under the first, notwithstanding his violation.

This Court held this defense not available, because the law, itself, prescribed the offense and punishment; that the administrative regulations only activated and established the criteria prescribed by the Statute. And that instead of Hark having violated only a regulation he had transgressed the law.

In the second, or Curtis-Wright case, identically the same conditions prevail, that is, the President by a second proclamation cancelled a first, which had been made to activate, by certain prerequisites, an Act of Congress prohibiting the exportation of War Materials to South American Countries then engaged in war. This Court held that the exportation by Curtis-Wright of airplanes, was a violation of the Act of Congress, and not of the first proclamation of the President.

In the third, Bowles, etc. vs. May Hardwood Co., the latter was charged with exceeding the price fixed by an administrative order on lumber, which had been increased by a later similar order. The defense was that the later order repealed or nullified the first thus discharging the Company. The Court of Appeals held that the violation was of the Statute and not of the Order.

It will be noted, that in all three instances, it was argued that the violation was of the first administrative order, which had been nullified by the second.

Here, the facts and the contention are entirely different. The suspending orders of the Food Administrator and the Secretary of Agriculture, here relied on, do not apply to former similar orders, but actually suspend the provisions of the Agricultural Adjustment Act, itself, and not Administrative orders. The same is true as to the Joint Resolution of Congress.

Wherefore, petitioner urges the disallowance of interest, the reversal of the Judgment and dismissal of the cause.

Respectfully submitted.

W. CLAY RODGERS,

Petitioner.